United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-7081

United States Court of Appeals

FOR THE SECOND CIRCUIT

CURTIS WARD,

Plaintiff-Appellant,

—against—

THE CITY OF NEW YORK, CONSOLIDATED EDISON OF NEW YORK, INC., JAMES MARTIN, JOCAR CAB CORP., COSTELLO CONSTRUCTION COMPANY, INC. and INTERBORO SURFACE COMPANY,

Defendants-Appellees.

BRIEF OF DEFENDANT-APPELLEE COSTELLO CONSTRUCTION COMPANY, INC.

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Preliminary Statement

In the United States District Court for the Southern District of New York, plaintiff-appellant, Curtis Ward, recovered a jury verdict in the amount of $750.00 as damages for personal injuries sustained on February 27, 1974, when he was a passenger in a taxi cab which allegedly stopped short after contacting certain metal plates in the roadway.

Plaintiff-appellant now appeals from the judgment entered upon the verdict on the sole ground that the verdict was inadequate.

The Jury Verdict Was Adequate and Reasonable

The verdict was entirely reasonable and adequate on the facts of this case.

There are absolutely no facts in the Record to support the contention of appellant, a vice-president of the Montgomery Ward Corporation, that the Jury was "prejudiced" against him in rendering its verdict because of his wealth or employment status.

On the contrary, the Record amply demonstrates that the verdict herein was well grounded upon the evidence and the award of $750.00 ample compensation for the injuries appellant sustained.

The Facts

It should be noted at the outset that the "Appendix" of testimony submitted by plaintiff-appellant, Ward, in furtherance of this appeal, clearly distorts the overall context of the Record by omitting salient portions of the testimony, including almost all of the cross-examination of appellant and his solitary medical witness. The complete trial minutes of appellant's testimony and that of his medical witness have been filed with this Court at the request of the writer. Moreover, excerpts from the trial minutes are being submitted and filed in a Supplemental Appendix should the Court wish to make reference to them.

It cannot be disputed that the occurrence which prompted this litigation was not a dramatic one. After the taxi cab in which plaintiff-appellant was riding came to an abrupt stop, appellant was thrown forward in his seat. Thereafter, he remained inside the cab for only 10 to 15 seconds before alighting therefrom (A-69).*

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* References are to pages of the Supplemental Appendix containing excerpts from the trial minutes.

Although he testified that he was "groggy and stunned" when he got out of the cab, appellant, nonetheless, was able to see that the left tire of the cab was situated up against the steel plates in the road. Appellant also had the presence of mind to secure both the cab driver's motor vehicle license number and his "hack" license number as well. Appellant, thereafter, entered the Montgomery Ward Building and proceeded to his sixth floor office where he reported the accident before visiting the Emergency Room of the French Polyclinic Hospital (A-69, 70).

At the French Polyclinic Hospital, appellant was physically examined. The hospital record, which was placed in evidence, notes that appellant sustained a fracture of the "*outer aspect*" of the left zygomatic bone "*with no real displacement*" (emphasis mine).

The hospital record also shows that appellant suffered from advanced pre-existing osteoarthritic changes unrelated in origin to the automobile accident of February 27, 1974.

Several hours after the occurrence, appellant was able to take a flight from New York to the State of Illinois (A-70).

In Illinois, appellant testified that he saw a Dr. McKeever *five times* for *check ups* (A-70).

A Dr. Soper was seen by appellant *twice*. Dr. Soper *checked* appellant on the first visit and removed sutures from appellant's lip on the second visit (A-71, 72).

A dentist, one Dr. Howard, supposedly saw appellant *once* to examine his loose tooth (A-72).

Finally, appellant saw a Dr. Davis approximately *seven times* for physical examinations and for one or two injections in the left shoulder. It appears moreover, that

Dr. Davis had been treating appellant for about four years before the occurrence for, among other ailments, a pre-existing arthritic condition (A-72, 73).

Appellant was not hospitalized as a result of the accident (A-73).

Appellant was absent from work for a period of about one week (A-73, 74).

Over continued objection by appellees, the Trial Court allowed plaintiff-appellant to testify fully before the Jury as to his visits with Drs. McKeever, Soper, the dentist, Dr. Howard, and Dr. Davis (appellant's direct testimony consumed approximately sixty pages), *although none of these doctors came to court to testify about the treatments given appellant, or the causal connection, if any, between these treatments and the accident in question.*

Contrary to the argument voiced in plaintiff-appellant's brief, the jury, quite obviously, was not obliged to return a verdict for the total amount of the "out of pocket" medical expenses claimed to have been incurred by appellant. In view of the failure of appellant to offer any competent medical proof at trial to establish the reasonableness of the medical expenses, or even the causal relation between the medical treatments and the accident, the jury was free in reaching its verdict to disregard all or part of the "out of pocket" expenses claimed. As noted, at least one of appellant's alleged treating doctors, Dr. Davis, had treated appellant before the accident for a pre-existing arthritic condition of many years duration which was unrelated to the accident.

It is axiomatic that plaintiff-appellant had the burden of proving to the Jury that the medical expenses claimed were all legitimately and reasonably incurred as a result of the occurrence complained of. The record is barren in this case of any such proof.

Overall, appellant's proof on the matter of monetary damages was considerably less than clear and convincing throughout the trial. For example, in a "Verified Bill of Particulars" filed in the within action, "Loss Of Earnings" in the amount of $2660.00 was unequivocally alleged by appellant. At trial, it was revealed that appellant had, in fact, lost no earnings as a result of the occurrence (A-75, 76). This misstatement, intentional or not, of a lost earnings claim certainly did not enhance the credibility of appellant's damage claims in the eyes of the Jury.

The only doctor to testify in appellant's behalf at trial was one, Dr. Irving Liebman. Dr. Liebman testified that he saw appellant *only once*—some 9 months after the accident. Dr. Liebman's physical examination of appellant took approximately one-half hour, including time spent by the doctor examining x-rays and the hospital record. A reading of the cross-examination of Dr. Liebman demonstrates the minor nature of the appellant's injuries and the pre-existing origin of his degenerative arthritic condition. Dr. Liebman did testify at trial that he found a "permanent cosmetic deformity" on appellant's left upper lip. Since no such "deformity", or even a visible scar, was in any way discernible to this writer as I observed appellant in court, I asked the Trial Court to allow the Jury to examine appellant's "deformity", as testified to by Dr. Liebman. Appellant stood before the Jury which was less than overwhelmed apparently by the seemingly invisible "deformity" on appellant's lip. Moreover, the Jury might well have thought Dr. Liebman's reference to a "deformity" on appellant's lip to be a blatant and inappropriate exaggeration of nothing more than a simple cut on the lip. The Jury may have concluded, further, that this type of exaggeration typified all of appellant's injury claims (A-77, 84).

Appellant has had his day in Court. Great latitude was afforded appellant by the Court Below in permitting ap-

pellant to present at length his injury and damage claims to the Jury. The charge of the Trial Court on the law of damages was most comprehensive and invited the Jury to consider all areas of lawful compensation for appellant. The Jury made its determination of damages fully informed on both the facts and law. There is not one scintilla of evidence in the Record to suggest that the Jury treated appellant unfairly or prejudicially in any way. On the contrary, the Trial Record strongly shows that the verdict represents a conscientious reflection on the part of the Jury as to the true value of appellant's case, based upon a careful evaluation of the evidence by the Jury and the observation of the witnesses who testified at trial. The verdict should not be disturbed.

Trial Court Denied Motion by Plaintiff-Appellant for a New Trial

Appellant's motion to set aside the Jury's verdict as inadequate was denied by the Court Below with a statement by the Court that appellant's "injuries were trivial". It is submitted that the action of the Trial Court in denying appellant's motion for a new trial was a sound exercise of judicial discretion based upon the observations and impressions of the Court during the trial and a recognition by the Court that the verdict of the Jury was in all respects just and proper.

Summary

Appellant has wholly failed to demonstrate that the verdict of the Jury in this case was in any way actuated by passion, prejudice, unfairness, legal error or abuse by either the Trial Court or the Jury. The cases cited

by appellant in his brief serve only to illustrate that the determination of damages in a given case is a matter that should be left to a trial court and jury after consideration by them of the peculiar facts and circumstances in each case.

In sum, plaintiff-appellant presents no legal basis for setting the verdict aside.

CONCLUSION

The verdict and judgment below should be affirmed, with costs to appellees.

Respectfully submitted,

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Of Counsel

United States Court of Appeals

376—Affidavit of Service by Mail For the Second Circuit The Reporter Co., Inc., 11 Park Place New York, N. Y. 10007

Curtis Ward

Plaintiff-Appellant

against

The City of New York, Consolidated Edison Company of New York Inc., James Martin, Jocar Cab Corp. Costello Construction Company Inc., and Interboro Surface Company,

Defendants-Appellants

State of New York, County of New York, ss.:

Raymond J. Braddick, , being duly sworn deposes and says that he is agent for Morris Duffy Ivone & Jensen Esqs. the attorney for the above named Defendants-Appellee , Costello herein. That he is over 21 years of age, is not a party to the action and resides at

Levittown, New York

That on the 21 day of May , 1976 he served the within

Supplemental Appendix and Brief

upon the attorneys for the parties and at the addresses as specified below

1. Levy & Platt Esqs. 380 Lexington Avenue, New York, New York
2. W. Bernard Richland, Corp. Counsel, Municipal Building, New York, New Yo
3. Nicholas A. D'Onofrio Esq. 123 William Street, New York, New York
4. Gerberbaum, Garson & Goldberg Esqs. 26 Court Street, Brooklyn, New York
5. William & O'Neill Esqs. 130 East 15th. Street, New York, New York

by depositing 2 true copies of each

to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at

90 Church Street, New York, New York

directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 21st.

day of May, 1976

Roland W. Johnson

Raymond J. Braddick

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977